

To be argued by
WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 132.

UNITED STATES OF AMERICA ex
rel. CATONI TISI,
Appellant,
against

ROBERT E. TOD, Commissioner of
Immigration at the Port of
New York,
Respondent.

BRIEF FOR APPELLANT.

Statement of Facts.

This is a direct appeal to this Court from an order of the Honorable Augustus N. Hand, D. J., in the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus (Record, p. 31). The question—that of a

finding unsupported by evidence—is under the Fifth Amendment to the Constitution of the United States.

On September 23, 1921, the Assistant Secretary of Labor issued a warrant for Tisi's deportation upon the ground that he has been found in the United States in violation of the Immigration Act of February 5, 1917, as amended by the Act of June 5, 1920, to wit:

"That he [writes, publishes, or causes to be written or published, or knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published or displayed, or] KNOWINGLY had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States or of all forms of law" (Record, p. 29).

This warrant, like the statute, specifies a number of alternative grounds for deportation. It is apparent from the record that the inclusion of the alternative grounds which we have bracketed and italicized in the foregoing quotation was wanton surplusage. This, we believe, is clear beyond necessity of discussion. We shall accordingly ignore the bracketed matter, treating the warrant as if it recited only that Tisi KNOWINGLY had in his possession proscribed literature for the purpose of circulation, etc.

The warrant was based upon a hearing before an immigration inspector at Philadelphia in August, 1921, at which Tisi and four Philadelphia police officers testified (Record, pp. 11-24). There was testimony of a loose, artificial and inconclusive

character that Tisi, among a dozen others, was seen folding proscribed literature. The literature was in English. Tisi was entirely ignorant of the English language and of the character of the literature.

It appears from the record that Tisi is an Italian shoemaker, forty-nine years old, resident in the United States since 1904, with a wife and two children. He cannot read or understand English. On April 25, 1921, Tisi called at Giuseppe Baldassare's house at 2232 Moore Street, Philadelphia, to collect a debt from Baldassare, and stayed awhile to chat and drink wine. There were about a dozen men in the room. They were grouped about a table upon which were piles of printed leaflets. The piles included copies of leaflets entitled "May Day of Revolution" and "May Day. Red Labor Day." These two leaflets were in evidence at the hearing and were of the proscribed character. The piles also included a great deal of other printed matter, some in English and some in Italian. None of this was in evidence at the hearing and it is to be presumed that none of it was of the proscribed character. Tisi had no information as to the nature or contents of any of the literature. Four police officers entered and arrested all the men and seized all the literature.

The material testimony of Tisi and each of the police officers will here be set out in detail.

Tisi, through an Italian interpreter, testified as follows:

"Q. Was there a meeting going on at the time you were arrested? A. I don't know, because as soon as I entered there they gave me a drink and we were discussing daily occurrences. * * *

Q. Do you know what was on the table at the time you were in the room with those other people you mention? A. There were a lot of papers on a table but I don't know what they were, because I cannot read English.

Q. Were all those papers in English or Italian? A. They appeared to me as if they were in English, but I did not pay much attention to it.

Q. Are you a member of the United States Communist Party of America? A. No.

Q. Will you explain to me what you were doing at the time you were in that room with Joseph or Giuseppe Baldassare and others who were arrested? A. Baldassare owed me money, and I went there that night to collect this money. While I was there I received \$25.00 on account of what Baldassare owed me, then they offered me a drink and I was there holding a conversation with them about the daily happenings and I was about to go when the Officers came in and arrested me.

Q. You were arrested along with the others that were assembled in that room at the time; weren't you? A. Yes, sir.

Q. Do you believe in the principles of the Communist Party of America? A. No.

* * * * *

Q. Did many of those persons drink wine that evening there? A. They were all drinking.

Q. As far as you are concerned, you made a business visit to that house that night? A. That is all; just for business.

Q. Can you read English? A. No.

Q. Did you know or understand any leaflets or stickers that were on the table at that time? A. No; I did not know.

Q. Did you see the leaflet I am showing you now on the table there that night (ex-

hibiting circulars 'May Day of Revolution' and 'May Day. Red Labor Day')? A. I don't know, because they were all piled up.

Q. Did you see the stickers there entitled 'Hail May Day' and 'Unemployed Mobilize' (exhibiting same to witness)? A. I don't know. I did not observe them.

Q. Did any of those persons tell you anything about this literature, leaflets, and stickers on the table? A. No. We didn't talk about those leaflets or stickers at all. We just spoke of business" (Record, pp. 12-14)

This testimony was in nowise impugned or contradicted.

In affidavits five days after the arrest (Record, pp. 27-28) furnished to satisfy the requirement of "probable cause" for the issuance of departmental warrants of arrest, the police officers swore simply that they had seized twelve men about a table covered with "seditious literature," which included a copy of "May Day of Revolution." They did not attempt to make out that they had observed any of the arrested persons performing any act with relation to literature of the proscribed character. At the hearing two months later, however, helped by the inspector's leading questions, they strengthened this testimony. It appeared that their primary concern was to keep covered men whom a glance at the literature had convinced them were "pretty desperate characters," and that they did not look especially at any particular man. They insisted, notwithstanding, that they had been able to observe that every one of the men was engaged in folding either "May Day of Revolution" or "May Day, Red Labor Day," rather than any of the innocent circulars. Officer Van Gilder testified:

"When we got in the dining room there were about ten or eleven men sitting around the table, which appeared to be a meeting there, and they were all folding circulars marked 'May Day of Revolution' and 'May Day, Red Labor Day.' There was quite a good deal of other stickers and papers and literature piled on the table; and we then placed them all under arrest.

Q. Did you observe particularly this alien before you in the act of folding these circulars? A. He and the rest of them were all folding circulars.

Q. All were folding circulars? A. Yes, sir. * * *

Q. What kind of paper was Tisi folding at the time? A. He had both 'May Day of Revolution' and 'May Day, Red Labor Day' in front of him. * * *

Q. How many other men were folding 'May Day of Revolution' leaflets? A. I said they were all folding them circulars. I didn't know which ones were folding 'May Day of Revolution' or which 'May Day, Red Labor Day.' * * *

Q. Now, officer, the circulars you refer to were they entitled 'May Day, Red Labor Day' and 'May Day of Revolution'? A. They were; some of them.

Inspector: I will introduce as evidence and make same a part of this record, marked 'Exhibit S1' and 'Exhibit S2,' circulars entitled 'May Day of Revolution' and 'May Day, Red Labor Day' " (Record, pp. 14-17).

Officer McCormack said:

"A. Why, we went there to raid the house at 2232 Moore Street. He was one around the table folding literature at the house there when we entered.

Q. Did you see him folding the literature?
 A. Why, his hands were on the table and the literature all around the table there and every one of them folding. * * *

Q. And was the literature this alien before you was folding this which I show you here, 'Exhibits S1' and '2'? A. Yes, sir.

Q. Was there other literature on the table? A. Yes; it was stickers and papers.
 * * * Why, when we came in they were all folding. I didn't look at no particular man; walked in and didn't look at any particular man. * * *

Q. Now, you would not say positively, under oath, when you came in Tisi was actually folding literature of the kind that is spoken of here? A. Oh, yes; because there were bundles there and you could see them.

Q. You say you did not pay any particular attention to any man? A. Sure not" (Record, pp. 17-19).

Officer McGoldrick said:

"We were sent there to make a raid on these Bolsheviks, as they were called, and as we entered the house this man, with about ten other men, was sitting around the table, and as we entered the door they had literature like this in front of them (indicating Exhibits S1 and S2) and they had them like this (indicating), and as we entered each man dropped his hands. I walks around to the table and picks up pieces of literature and seen what it was. * * * It just took about a second or so for every officer to be in the room covering the men, because under reading of some of the literature it looked as if they were pretty desperate characters, and we didn't lose much time to find out what was going on. * * *

Q. Now, officer, you are willing to positively swear that this alien before you, when you entered the room, was in the act of folding these circulars, Exhibits S1 and S2, that are shown you here? A. Yes, sir" (Record, pp. 19-21).

Officer Powers said :

"So we went up to the house, and on entering seen eleven men sitting around the table folding literature; so we told them all to put their hands on the table, to keep their hand on the table, and went through them to see that they didn't have any guns or anything. I didn't know the officer now, but one 'phoned for the wagon, and we took them all, took literature and all.

Q. Now, what was this particular person here, Mr. Tisi, doing at the time you entered the room? A. The time I entered the room, he was folding circulars.

Q. Did you see him folding circulars? A. Yes; I did.

Q. Were the circulars like this I show you here, marked Exhibits S1 and S2? A. Yes, sir.

Q. Were all these sitting around the table engaged the same way? A. They were, except one man, who was writing in a book" (Record, p. 22).

It is believed that the foregoing comprises the entire evidence so far as material. No particular piece of paper was introduced as specifically handled by Tisi. Nothing was introduced to show that he knew the nature of any of the literature. He is an Italian. He was examined through an interpreter. There was no faintest suggestion that he could read the English circulars. And it can-

not be inferred without evidence that the other men in the room, engaged in acts for which under the laws of Pennsylvania they were liable to criminal punishment, disclosed to Tisi the character of the circulars.

Specification of Error.

The District Court erred in not holding that there was no evidence whatever tending to support the finding that Tisi **KNOWINGLY** possessed literature of the proscribed character (see Assignment of Errors, p. 33).

Argument.

There was no evidence whatever of any knowledge on Tisi's part of the nature and contents of any of the literature.

The discretion of the Secretary of Labor, within the statutory limits allotted to it, is, of course, not subject to review. His finding upon conflicting evidence, or, as in this case, upon weak, artificial and inconclusive evidence, that an alien possessed proscribed literature, might stand, even though contrary to fact.

But when he purports to make a finding of **KNOWING** possession without any evidence, he arbitrarily usurps a power not entrusted to him and violates the principles of due process of law.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 108, 109.
Lewis v. Frick, 233 U. S. 291, 297.

Even though the Secretary of Labor believed the testimony of the police officers upon the point of Tisi's folding of proscribed literature, he would have no basis for imputing to Tisi knowledge of its proscribed character. The word "knowingly" in such a statute imports that there must be proof not only that the alien was conscious of his physical possession of the literature but also that he was conscious of its character.

Price v. United States, 165 U. S. 311.

Rosen v. United States, 161 U. S. 29.

Spurr v. United States, 174 U. S. 728.

Potter v. United States, 155 U. S. 438, 446.

Felton v. United States, 96 U. S. 699, 702.

Pettibone v. United States, 148 U. S. 197.

The evidence that Tisi could not read English and was ignorant of the character of all the leaflets, whether proscribed or innocent, on Baldassare's table, was positive and uncontradicted. He went to Baldassare's house to collect a debt and stayed to talk and to drink wine. There is no intimation in the record of any doubt or suspicion of the veracity of these statements. But even if the Secretary of Labor indulged an incredulity which there was nothing in the record to warrant, he would be left without a shadow of ground for a contrary affirmative finding. The police officers' testimony that Tisi folded leaflets, if true, entirely fails to establish that he had any knowledge of their contents. Slight evidence would doubtless serve to raise an inference that a man found folding literature was aware of its character. But where, as here, the circumstances are entirely consistent with his ignorance of its character, there can be no contrary inference.

In a similar case of a non-English speaking alien (*U. S. ex rel. Kasparian v. Hughes*, 278 Fed. Rep. 262), Judge Thompson in the United States District Court for the Eastern District of Pennsylvania sustained a writ of habeas corpus, saying, at page 265:

"That statutes creating an offense 'knowingly' committed import knowledge as to all the essential ingredients of the offense, is an undoubted and well-recognized rule of construction and a reasonable one. If the mere distribution without further knowledge were sufficient, the word 'knowingly' would be superfluous, as one could not well distribute circulars without knowledge that he was distributing them. * * *

In order to have ground for deportation, it was necessary that the Department of Labor should be satisfied, not only that the relator distributed these seditious circulars, but that he knew the contents to be of a seditious character. If it had been shown that the relator could at the time of his arrest read the English language, there would have been evidence on which to base a conclusion that he knowingly committed the act charged. Any evidence, however slight, would have been sufficient. The only evidence upon the subject was derived from the statement of the alien himself. The Secretary of Labor was at liberty to disbelieve the testimony of the respondent. But that would leave the case with the mere naked fact of distribution together with the additional fact that the relator was an Armenian, whose statement it was necessary to take through a Turkish interpreter. * * *

This is not a case in which the court is passing upon the cogency of the evidence in determining whether the evidence upon the

subject of knowledge would have moved this court to the conclusion at which the Department arrived. The record shows there was concededly no evidence that the relator knowingly committed the acts charged, and that the conclusion of the Department was based upon an erroneous construction of the statute."

In the case at bar the utmost which the record can be claimed to show is this: an innocent and natural participation by an Italian in a manual task of folding English papers—a task which the circulation of wine was calculated to make attractive. The imputation to him of knowledge of the character of the papers is wholly arbitrary.

The order appealed from should be reversed and the writ of habeas corpus sustained.

Dated, October 15, 1923.

Respectfully submitted,

WALTER NELLES,
ISAAC SHORR,

Attorneys and Counsel
for Appellant,
80 East 11th Street,
New York City.

No. 640 132

FILED

JUN 4 1923

WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA EX REL. CATONI TISI,
ALIAS LISTA CORTINA, RELATOR,

against

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION AT THE
PORT OF NEW YORK, RESPONDENT.

STATE OF NEW YORK,

County of New York, ss:

FANNIE SIEGARTEL, being duly sworn, says that she is over eighteen years of age and is in the employ of Walter Nelles and Isaac Shorr, the attorneys for the relator herein; that on the 1st day of June, 1923, at five o'clock p. m., she served the annexed affidavit and notice of motion upon Harry M. Daugherty, Attorney General of the United States, by depositing a true copy thereof in the United States mail at the branch post-office known as Station "D," Borough of Manhattan, City of New York, the same being one of the regular branch post-offices of the New York City General Post-Office, enclosed in a securely closed wrapper, with the postage thereon prepaid, addressed to said Attorney General at his office in Washington, D. C.

FANNIE SIEGARTEL.

Sworn to before me this 2nd day of June, 1923.

[Seal of Carol Weiss King, Notary Public, New
York County.]

CAROL WEISS KING,
Notary Public, New York Co. Clerk's No. 310.

New York Co. Register's No. 4203.

Commission expires March 30, 1924.

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA *ex Rel.* CATONI TISI, *alias* LISTA
CORTINA, *Relator*,

against

ROBERT E. TOD, *Commissioner of Immigration at the Port
of New York, Respondent.*

SIRS:

Please take notice that upon the annexed affidavit of Isaac Shorr, one of the attorneys for the relator, duly verified the first day of June, 1923, the undersigned will move this court on Monday, the 4th day of June, 1923, at the opening of the court, or as soon thereafter as counsel can be heard, for an order rescinding the order dismissing this case on the 19th day of February, 1923, for failure to comply with the 10th rule of the General Rules of the United States Supreme Court, and for such other and further relief as to the court may seem just and proper.

WALTER NELLES,
ISAAC SHORR,
Attorneys for Relator.

Office and P. O. address, 80 East 11th street, Borough of
Manhattan, City of New York.

To Harry M. Daugherty, Attorney General, Washington,
D. C.; William Hayward, United States Attorney for the
Southern District of New York.

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA *ex Rel.* CATONI TISI, *alias*
LISTA CORTINA, *Relator*,

against

ROBERT E. TOD, *Commissioner of Immigration at the Port of*
New York, Respondent.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

ISAAC SHORR, being duly sworn, says that he is one of the attorneys for the relator; that it is the earnest desire of the relator, as well as his counsel, to prosecute this appeal; that it was extremely difficult for the relator to obtain the necessary money to print the record on appeal, but that he has now obtained the money and tenders it to the Clerk for the printing. While he was informed that he would have to put up the money for printing the case, he was not informed by his counsel that he would have to do that within ninety days, due to an oversight on the part of his counsel. I therefore ask that an order be made rescinding the order of the 19th day of February, 1923, dismissing the appeal with costs on condition that the amount of money necessary for the printing be immediately paid to the Clerk.

ISAAC SHORR.

Sworn to before me this 1st day of June, 1923.

JOSEPH R. BRODSKY,
Notary Public, New York County.

New York Co. Clerk's No. 732, Register's No. 4045A.

Kings County Clerk's No.—, Register's No. 43—.

Bronx County Clerk's No. 53, Register's No. 320.

Term expires March 30, 1924.

[Endorsed:] United States Supreme Court. United States of America *ex Rel.* Catoni Tisi, *alias* Lista Cortina, relator, against Robert E. Tod, Commissioner of Immigration at the Port of New York, respondent. Affidavit and notice of motion. Walter Nelles, Isaac Shorr, Attorneys for relator, 80 East 11th Street, New York City.

[Endorsed:] File No. 29190. Supreme Court U. S., October term, 1922. Term No. 640. The United States *ex Rel.* Catoni Tisi, etc., appellant, *vs.* Robert E. Tod, Commissioner, etc. Motion and affidavit to reinstate case to the docket, with affidavit of service. Filed June 4, 1923.